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will revive the balance of the old liability, on the ground that such composition is merely one form of bankruptcy proceedings under the National Act.

THE EFFECT OF JUDGMENTS BY CONSENT.—There is some difference of opinion among the authorities as to the consequence of a judgment by consent. Some courts refuse to give it the effect of a judgment *in invitum*, and admit the judgment record only as evidence of the agreement reached by the parties.<sup>1</sup> The basis of this position is the theory that no matter upon which the court has not exercised its judicial mind by determining the respective rights of the litigants and pronouncing judgment accordingly can be considered *res judicata*. As a matter of definition, this proposition is scarcely open to question. The real gist of the controversy has been settled by the act of the parties while the court in entering up judgment has performed merely a ministerial function. On the other hand, the parties have caused the court to place their deliberate agreement upon the record as a formal judgment; and except in case of mistake or fraud, it would seem that they should be estopped from later denying it, even though the strict principles of *res judicata* are not applicable.<sup>2</sup> In fact the majority of jurisdictions disregard the argument of definition and hold the judgment binding upon the parties according to its terms.<sup>3</sup> The original cause of action is considered merged in the judgment, and to a later suit between the same parties on the same subject-matter a plea of *res judicata* is a complete defense.

Where, however, the action is simply dismissed by the consent of the parties, there is not the same ground for the argument of estoppel. The terms of the agreement which culminated in the dismissal do not appear in the judgment. The words of the judgment record, "dismissed agreed," are capable of several interpretations. Some courts give to them the effect of the old common law *retraxit*, which is defined as an open and voluntary renunciation by the plaintiff of his suit in court by which he forever loses his cause of action.<sup>4</sup> Others reach the same result by holding that they necessarily imply that the parties have adjusted their differences and merged their cause of action in the judgment of dismissal.<sup>5</sup> The Supreme Court of Tennessee recently endorsed the third view that the record is plain and unequivocal and leaves no room for construction.<sup>6</sup> *Lindsay v. Allen*, 82 S. W. Rep. 171. It states only that the parties have agreed to a dismissal and nothing more. Consequently it leaves them in the same position as before the commencement of the litigation. The question seems to be strictly one of intention of the parties as shown by the judgment record. Have they agreed upon renunciation of all claim of right, or upon merger of the cause of action in the judgment, or upon a simple dismissal of the suit without impairing any existing rights? Any one of the three is possible; but the last seems the most natural interpretation, for it is certainly a harsh rule that deprives a person of rights which he has not renounced expressly or by necessary implication.

<sup>1</sup> *Jenkins v. Robertson*, L. R. 1 H. L. Sc. 117, 122.

<sup>2</sup> See *Kelly v. Town of Milan*, 21 Fed. Rep. 842, 863.

<sup>3</sup> *Nashville, etc., Ry. Co. v. United States*, 113 U. S. 261.

<sup>4</sup> *Hoover v. Mitchell*, 25 Grat. (Va.) 387.

<sup>5</sup> *Bank of Commonwealth v. Hopkins*, 2 Dana (Ky.) 395.

<sup>6</sup> *Bishop v. McGillis*, 82 Wis. 120.